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No. 07-1

Supreme Court, U.S.
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In The
Supreme Court of the United States

HOLLY LONG,

Petitioner,

vs.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, and STATE DEPARTMENT OF EDUCATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner has presented compelling reasons, as defined in SUP. CT. R. 10, to grant the Petition where there is no conflict among the courts of appeal and the decision below is based on well-developed case law decided in accord with the policies and purposes underlying the Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1415 *et seq.*, and 42 U.S.C. § 1983.

2. Whether the Petitioner's claims, if otherwise valid, are barred by the applicable statute of limitations.

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STATEMENT OF THE CASE

Holly Long ("Holly") claims she was denied a free appropriate public education by the Dawson Springs Independent School District ("Dawson Springs") in violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1415 *et seq.* Holly also asserts a claim under 42 U.S.C. § 1983 ("§ 1983") for Dawson Springs' alleged violation of the IDEA. Holly's Petition should be denied because there is no compelling reason, as defined in SUP. CT. R. 10, to issue a Writ of Certiorari. There is no conflict among the courts of appeal relating to the issues raised. The well-established law developed under the IDEA, which is soundly based in the policies and purposes of the IDEA and § 1983, establishes that the United States District Court for the Western District of Kentucky (the "District Court") and the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") correctly held that Holly failed to exhaust her administrative remedies and that general money damages, as opposed to reimbursement for educational expenses incurred, are not recoverable in an action under the IDEA. In addition, Holly's claims are barred by the applicable statute of limitations, so that even if she were correct concerning her IDEA and § 1983 claims, she is not entitled to the relief she seeks and there is no reason to grant her Petition.

Since a thorough discussion of the legal and factual background giving rise to this case was not included in Holly's Petition and is necessary to an understanding of the case, Dawson Springs provides it here.

I. Statutory and Regulatory Background.

The purpose of the IDEA is to ensure that disabled children attending public schools receive an education that is tailored to their individual circumstances. 20 U.S.C. § 1400(d)(1)(A) states one of the purposes of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment, and independent living." IDEA jurisprudence refers to a "free appropriate public education" by the acronym "FAPE."

In order to receive federal funding to assist them in providing services to disabled children, states must comply with the provisions of the IDEA. 20 U.S.C. § 1412. One of the cornerstones of the IDEA is the Individualized Education Program ("IEP"), 20 U.S.C. § 1414(d)(1)(A), a plan for educating a child based on that child's individual needs as determined by a detailed assessment of the child's status, capabilities, etc.

The Secretary of Education is charged with administering the IDEA and has promulgated regulations appearing at 34 C.F.R. Part 300. The state agency responsible for providing public education is referred to as the State Education Agency ("SEA") in those regulations. A local education agency such as a school board is referred to in the IDEA regulations as a Local Education Agency ("LEA"). 34 C.F.R. § 300.2(a)(i) and (ii). In Kentucky, the SEA is the Kentucky Department of Education ("KDE"). Dawson Springs is the LEA involved in the instant case. The KDE has adopted administrative regulations to comply with the requirements of the IDEA which appear at 707 KAR Chapter 1. Kentucky's administrative regulations, to a large extent, mirror the federal regulations appearing in 34 C.F.R. Part 300.

One of the principles permeating the IDEA and its implementing regulations is that decisions affecting a particular child should be made on the local level based on the input of the child's teachers and parents and others having specialized knowledge of the individual child's particular needs. To this end, Kentucky regulations require that an Admissions and Release Committee ("ARC") be formed for each special education child. The ARC is "responsible for developing, reviewing, or revising an individual education program (IEP) for a child with a disability." 707 KAR 1:280 Section 1(1). Once a child reaches the age of 14, the ARC determines the "transition

services" that should be provided to the child. 707 KAR 1:320 Section 3(2). "Transition services" are those services that are directed at assisting the child in moving "from school to post-school activities." 707 KAR 1:280 Section 1(55). The ARC consists of the child's parents, one of the child's regular education teachers, a special education teacher, a specialist in providing education to disabled children, and the child, if appropriate. 707 KAR 1:320 Section 3.

20 U.S.C. § 1415 provides remedies to a child who claims to have been denied a FAPE. These remedies include all rights, procedures and remedies available under federal law. 20 U.S.C. § 1415(l). Specifically, a child who claims to have been denied a FAPE may request a due process hearing, 20 U.S.C. § 1415(f), and may appeal the results of that due process hearing to the SEA. 20 U.S.C. § 1415(g). If dissatisfied with the decision of the SEA, the child may file a civil action in state or federal court. 20 U.S.C. § 1415(i)(2). One important proviso with respect to these remedies is the requirement of 20 U.S.C. § 1415(l) that before a civil lawsuit is filed, the child must exhaust all available administrative remedies. The statute states:

> Nothing in this *title [20 USCS §§ 1400* et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [*29 USCS §§ 790* et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [*20 USCS §§ 1411* et seq.], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [*20 USCS §§ 1411* et seq.]. (Underlined emphasis added; italics in original.)

Subsections (f) and (g) of 20 U.S.C. § 1415(l) provide for a due process hearing and an appeal to the SEA from that

due process hearing. These remedies are provided in Kentucky pursuant to 707 KAR 1:340 Sections 7 and 8.

In 707 KAR 1:340 Section 15 the Kentucky regulations also provide a Complaint Resolution Procedure ("CRP") with respect to written complaints submitted pursuant to 34 C.F.R. §§ 300.660-662. Although an appeal to the KDE from a CRP is provided in 707 KAR 1:340 Section 15(4), no further appeal is provided and no right to pursue a civil action following the CRP is provided in the Kentucky regulations, the federal regulations, or the IDEA. The remedies the KDE may impose as the result of a CRP are limited to technical assistance activities, negotiations, and requiring the LEA to take corrective actions. 707 KAR 1:340 Section 15(6).

II. Procedural and Factual Background.

A. Procedural Background.

Holly filed a complaint on June 28, 2001, in the District Court seeking relief under several federal statutes, including the IDEA. The gravamen of Holly's complaint was that while she was a special education student at Dawson Springs from January 23, 1992, until November 28, 1994, she was denied a FAPE.[1] The District Court held, *inter alia*, (1) it did not have subject matter jurisdiction with respect to Holly's IDEA claims because she failed to exhaust her administrative remedies and (2) Holly was not entitled to general monetary damages under § 1983 for the alleged violation of the IDEA. Holly appealed the District Court's judgment to the Sixth Circuit, which affirmed the decision of the District Court in an unpublished opinion.

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[1] Although Holly's complaint alleged violations of several other federal statutes in addition to the IDEA, she has chosen to limit her appeal to her rights under the IDEA, since that is the only statutory source of substantive federal rights discussed in her brief before the United States Court of Appeals for the Sixth Circuit and in her Petition for Writ of Certiorari to this Court. This brief will, therefore, discuss only the IDEA as the statutory source of Holly's claimed substantive federal rights.

Holly has now petitioned this Court for a Writ of Certiorari.

B. Factual Background.

In support of its motion to dismiss the complaint and its renewed motion to dismiss the complaint in the District Court, Dawson Springs filed two affidavits of Dorinda Allen, its Director of Special Education. Record 5, Motion to Dismiss, Exhibit 1; Record 59, Response in Support of Renewed Motion to Dismiss, Exhibit 2. Holly made no effort in the District Court to controvert a single factual statement set forth in Ms. Allen's affidavits, since the facts set forth in those affidavits are extensively documented by attached exhibits. Together, these two affidavits and the documents attached thereto detail the events that led up to Holly's lawsuit. These events are summarized as follows.

In September 1994 Holly's mother, Carole Long ("Carole"), became dissatisfied with the education provided to Holly by Dawson Springs[2] and requested a due process hearing to determine whether Holly was receiving a FAPE. After the due process hearing had been scheduled by the KDE, Carole withdrew her request eight days before the hearing was to be held in November 1994. The due process hearing was cancelled and the case was closed by the KDE. Carol removed Holly from Dawson Springs in November 1994 and moved across the state to Oldham County, Kentucky, where Holly was enrolled in school and eventually received a certificate of completion, a special education student's equivalent of a high school diploma. After Holly moved to Oldham County in 1994, Dawson Springs had no further contact with her for three and one-half years.

In May 1998, approximately three and one-half years after Holly had been removed from Dawson Springs, Carole instituted CRP proceedings before the KDE on

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[2] It is undisputed that Holly is entitled to special education services.

Holly's behalf, alleging that Dawson Springs had not provided Holly a FAPE. Dawson Springs disputed Carole's claim. The KDE issued its final decision on September 28, 1999. The KDE's final decision held that Dawson Springs had denied Holly a FAPE, and that Holly was entitled to compensatory education. Consistent with the policy that educational needs should be determined initially at the local level by those most familiar with the child's individual needs, the KDE directed that an ARC meeting be convened to determine what compensatory education should be provided to Holly and required Dawson Springs to report the progress of the ARC to the KDE. The September 28, 1999, decision of the KDE states:

> Therefore, the student is entitled to compensation for educational services not provided. The Corrective Action Plan (CAP) requires the district to convene an ARC meeting with the student to determine how, when, where and in what form the services will be provided. The district must submit to this office copies of ARC meeting invitations as well as conference summary reports which describe the results of any ARC meetings held with the emancipated student by November 30, 1999. (Emphasis added.)

After the final decision of the KDE on September 28, 1999, Dawson Springs promptly scheduled an ARC meeting for November 16, 1999, to be held at Dawson Springs' offices in Hopkins County, Kentucky. Holly and Carole refused to attend that meeting. Carole would agree to attend a meeting only if it were held in Frankfort, Kentucky, and only if a representative of the KDE attended. The KDE refused to send a representative to the ARC meeting because the composition of the ARC is prescribed by regulation and the regulation does not include the KDE as a member of the ARC.

After the dispute concerning the KDE's participation in the ARC meeting was resolved, another ARC meeting was promptly scheduled for February 28, 2000. Dawson Springs agreed to hold the meeting in Frankfort, Kentucky, in order to accommodate Carole and Holly. When

the meeting was finally held, Dawson Springs voluntarily agreed to pay for two months of evaluation services by Career Visions, the entity Carole selected to provide compensatory education for Holly, and Carole accepted this proposal. An evaluation was needed because, at the time the ARC met, Dawson Springs had not been in contact with Holly for almost six years, during which time she had graduated from the Oldham County school system. The evaluation was to determine what form the compensatory education should take and how much compensatory education was appropriate.

Dawson Springs sent Career Visions a questionnaire to elicit information concerning the nature of Holly's needs and her ability to benefit from compensatory education. Career Visions, at Carole's direction, refused to respond to the questionnaire.

Career Visions finally issued a report setting forth its findings on May 16, 2000, although it did not respond to Dawson Springs' questionnaire. Dawson Springs promptly scheduled an ARC meeting for June 13, 2000, to discuss the report and sent advance written notice of the meeting. Holly and Carole, without explanation, failed to attend the scheduled meeting. Rather than proceed with the meeting in Holly's and Carole's absence, Dawson Springs, after unsuccessful attempts to contact Carole by phone on the day of the meeting, decided to reschedule the ARC meeting.

The ARC meeting was rescheduled for June 29, 2000. Before the meeting took place, Dawson Springs was advised that Holly was represented by an attorney, Mr. Ed Dove. Mr. Dove was unable to attend the scheduled meeting on June 29, 2000, and the ARC was canceled and rescheduled in order to accommodate Mr. Dove's schedule.

In an effort to resolve the matter, Dawson Springs offered to provide Holly with the compensatory education recommended by Carole's chosen vendor, Career Visions. The offer was sent to Mr. Dove. Career Visions recommended a program of instruction consisting of one and one-half hours of instruction per day, two days per week.

Dawson Springs offered to provide this recommended instruction through Career Visions at Dawson Springs' expense. Since Career Visions' recommendation stated no duration for the services to be provided, Dawson Springs offered 104 weeks (two years) of compensatory education; Dawson Springs reasoned that since Holly had actually attended school in Dawson Springs for a period of slightly less than two years,[3] two years of compensatory education would be appropriate.

The next communication Dawson Springs received was a phone call from Holly's attorney stating that he no longer represented Holly or Carole. Since Mr. Dove was no longer involved, and in order to ensure that Holly and Carole were aware of its offer, Dawson Springs communicated its offer directly to them in a letter from Superintendent David Boggs dated July 13, 2000.

On August 10, 2000, Dawson Springs heard from a new attorney who had been retained to represent Holly, Mr. Teddy B. Gordon. Mr. Gordon took an aggressive stance, threatening a federal lawsuit unless Dawson Springs would agree to furnish, not two, but three years of compensatory education; Mr. Gordon further demanded that during that three years Holly must receive two hours of instruction three days a week, whereas the recommendation of Career Visions, Carole's chosen vendor, was for one and one-half hours of instruction two days per week. The new demand constituted a 50% increase in the duration of the compensatory education (three years vs. two years) and a 100% increase in the amount of compensatory education to be furnished each week (three hours vs. six hours); no explanation was given as to why the demand exceeded the recommendations of Career Visions, which Carole had selected to be the entity that would provide compensatory education to Holly.

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[3] Holly was enrolled in school in Dawson Springs from January 28, 1992, until November 7, 1994, a period of slightly over two years. Holly attended school in the Dawson Springs school district for 97 weeks during this period of time.

Upon receiving Mr. Gordon's demand, Dawson Springs promptly scheduled an ARC meeting for August 30, 2000, to discuss his proposal. Without explanation, neither Mr. Gordon nor Carole attended the ARC meeting, so the meeting was rescheduled for September 20, 2000. At the ARC meeting of September 20, 2000, Mr. Gordon made a new demand: that in addition to compensatory education, Dawson Springs must purchase an expensive state-of-the-art graphics computer for Holly's use at home. There was some discussion of a compromise and the parties agreed to reconvene after Career Visions completed the questionnaire Carol had previously instructed Career Visions not to provide (the questionnaire addressing Holly's needs and her ability to benefit from the proposed compensatory education).

Upon receiving the completed questionnaire from Career Visions, Dawson Springs promptly scheduled another ARC meeting for November 17, 2000. On November 17, 2000, Dawson Springs agreed to the demand, first presented at the September 20, 2000, ARC meeting, that Holly be furnished with the use of an expensive state-of-the-art graphics computer, but maintained its position regarding the amount of compensatory education to be provided by Dawson Springs. Knowing that the meeting had not concluded, Holly and her representatives nevertheless withdrew from the meeting. The meeting continued and the ARC adopted Dawson Springs's proposal.[4] Holly was notified in writing of the ARC's decision.

Thus, the September 28, 1999, final decision of the KDE, directing that an ARC be convened to develop a compensatory education plan for Holly, was implemented in spite of Carole's failure to cooperate with efforts to comply with that decision (unexplained failure to attend four ARC meetings), as well as her actual obstruction of Dawson Springs' efforts (directing Career Visions to ignore

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[4] The KDE had previously advised Dawson Springs that the ARC was required to adopt a compensatory education plan regardless of Carole's lack of cooperation with the ARC.

Dawson Springs' questionnaire), and only after Carole withdrew from the final ARC meeting knowing the meeting was not completed. Carole took the position, which she still maintains, that when the KDE determined, on September 28, 1999, that Holly was entitled to compensatory education, Carole was given a blank check to dictate what compensatory education would be provided and the length thereof. The KDE's September 28, 1999, decision, as quoted above, did not go so far, but left it to the ARC to determine what compensatory education was appropriate.

As of November 17, 2000, the date the ARC prescribed the compensatory education that should be provided to Holly, the regulatory framework provided that a party aggrieved by the decision of an ARC had two alternate procedures available to challenge the ARC's decision: (1) a due process hearing, or (2) if voluntarily agreed to, mediation. 707 KAR 1:340 Sections 5 and 6. Rather than pursue the remedies provided by regulation, Holly's attorney demanded that the KDE force Dawson Springs to accede to his previous demands. The KDE, in response, advised Holly's attorney that since the ARC had prescribed the compensatory education services to be provided to Holly, Dawson Springs had complied with the KDE's final decision rendered September 28, 1999, and the KDE was closing its case. The KDE advised the Longs and their attorney of the correct procedure for contesting the ARC's decision as set forth in 707 KAR 1:340 Sections 5 and 6.

Holly's attorney ignored the prescribed procedures for resolving disputes between the ARC and the student, and made the same demand one month later on January 17, 2001. The KDE's response was the same as it had been one month previously.

One month later, on February 14, 2001, Holly agreed to participate in mediation, one of the administrative remedies provided for a student dissatisfied with the decision of her ARC. The KDE appointed one of its most experienced mediators, Mr. John Llewellyn, and a pre-mediation conference was held on May 22, 2001. Dawson Springs offered a compromise that would provide Holly

with the three years of compensatory education she demanded, but with periodic evaluations to ensure that Holly was, in fact, benefiting from the services provided. Carole withdrew from the mediation process and it was never completed; rather, this lawsuit was filed on June 28, 2001. On July 23, 2001, shortly after the lawsuit was filed, Mr. Gordon withdrew from representing Holly and Mr. Leon Rudloff, Holly's present counsel, was retained.

During the course of the proceedings in the District Court, Carole refused to allow Holly to begin the course of compensatory education prescribed by Holly's ARC on November 17, 2000. Dawson Springs sought and was granted an order of the District Court directing that Holly begin the compensatory education to be provided by Career Visions. Since Dawson Springs had previously offered to provide three years of compensatory education at the pre-mediation conference subject to periodic evaluations to determine that Holly was making progress, the District Court proposed and Dawson Springs agreed that three years of compensatory education would be provided. Holly has now received three full years of compensatory education from Career Visions.

In summary, Carole, on Holly's behalf, has on three occasions abandoned prescribed administrative remedies when Dawson Springs did not unconditionally accede to her demands:

- Carole abandoned the November, 1994, due process hearing she requested;
- Carole withdrew from the November 17, 2000, ARC meeting held in compliance with the KDE's September 28, 1999, decision;
- Carole withdrew from the mediation that took place immediately before this case was commenced.

SUMMARY OF ARGUMENT

SUP. CT. R. 10 states that there must be a compelling reason for granting a Petition for Writ of Certiorari and

enumerates the following factors that will trigger a grant of a Petition for Writ of Certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

None of these criteria are present in the instant case and there is no compelling reason to grant the Petition. Rather, the decisions of the District Court and the Sixth Circuit are based on well-established law that is firmly grounded in the purposes and policies underlying the IDEA and § 1983.

The Sixth Circuit correctly affirmed the District Court's decision that Holly's claim under the IDEA is barred by her failure to exhaust her administrative remedies. Holly's contention that pursuing her administrative remedies would have been futile was not eligible for consideration by the Sixth Circuit and is not eligible for consideration by this Court because that contention was not made in the District Court; in any event, the facts of the case demonstrate that Holly's pursuit of the available administrative remedies would not have been futile, since she was successful in pursuing those remedies, insofar as she did so, before filing her action in the District Court.

Holly, who claims no unreimbursed educational expenses, is not entitled to general money damages either under the IDEA or § 1983. Case law makes it clear that such damages are not available in an action directly under the IDEA. Since § 1983 creates no remedies, but merely provides a mechanism to enforce remedies created by substantive federal law, Holly cannot obtain money damages by asserting a claim based on a violation of the IDEA under § 1983.

Even if Holly had valid claims under the IDEA or § 1983, they are barred by the applicable statute of limitations.

ARGUMENT

I. Holly Was Required to Exhaust Her Administrative Remedies Before Bringing a Civil Action in the District Court.

A. The statutory exhaustion requirement serves salutary purposes and applies whenever relief that is available under the IDEA is sought.

The law regarding exhaustion of administrative remedies is well established, both generally and as it applies to IDEA cases. There is no allegation in the Petition that there is any conflict among the courts of appeal as to the law applicable to the exhaustion requirement.

The federal appellate courts have clearly held that 20 U.S.C. § 1415(l) means exactly what it says: before a civil action may be brought in which the relief sought is available under the IDEA, the putative plaintiff must exhaust all available administrative remedies. 20 U.S.C. § 1415(l) states, in relevant part:

> [b]efore the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted . . .

At least seven of the twelve federal courts of appeal have so held in ten published opinions. *See Gean v. George W. Hattaway*, 330 F.3d 758, 773 (6th Cir. 2003); *Robb v. Bethel School District #403*, 308 F.3d 1047, 1048 (9th Cir. 2002); *Cudjoe v. Independent School District No. 12*, 297 F.3d 1058, 1063 (10th Cir. 2002); *Polera v. Board of Education*, 288 F.3d 478, 488 (2nd Cir. 2002); *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 56 (1st Cir. 2002); *Weber v. Cranston School Committee*, 212 F.3d 41, 52 (1st Cir. 2000); *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000); *Covington v. Knox County School System*, 205 F.3d 912, 916 (6th Cir. 2000); *Babicz v. School Board of Broward County*, 135 F.3d 1420 (11th Cir. 1998); and *Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989 (7th Cir. 1996).

As pointed out by these courts, the policy underlying the IDEA requires that one who is dissatisfied with a LEA's attempt to provide a FAPE must exhaust all available administrative remedies before going to court. That underlying policy is that the LEA and the student's ARC, which possess far more expertise in matters of education than federal courts, should be given the opportunity to provide a FAPE before the matter is litigated. As stated in the often-cited case of *Charlie F.*, *supra*:

> Under the IDEA, education professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.

98 F.3d at 992.

Other policy considerations mandate that administrative remedies be exhausted before an IDEA lawsuit is filed. The court in *Cudjoe*, *supra*, describes these considerations as follows:

> Besides the statute's straightforward and explicit requirement that plaintiffs exhaust administrative measures for available relief before filing a civil action, the policy supporting the exhaustion requirement also counsels that parents turn first to educational professionals, as opposed to courts, to

> remedy disputes over a child's education. The IDEA's design provides a "carefully structured procedure for administrative remedies," which encourages parents to seek relief quickly when the injury occurs and "allows the educational system to bring its expertise to bear in correcting its own mistakes."
>
> * * *
>
> Aside from the unique advantages realized by the student from having educational experts address the shortcomings in the student's education in the first instance, other benefits flow from requiring exhaustion of administrative remedies, such as allowing the agency to exercise its discretion and correct its own mistakes, and to develop technical issues and a factual record fully prior to court review.
>
> * * *
>
> The factual record developed is "an invaluable resource for a state or federal court required to adjudicate a subsequent civil action covering the same terrain." *Id.* Exhaustion generally "is credited with promoting accuracy, efficiency, agency autonomy and judicial economy," [citations omitted] and in the realm of special education, its benefits, both to the student and to the judiciary, prove to be even more valuable.

297 F.3d at 1065-66.

The reasoning of the courts of appeal requiring the exhaustion of administrative remedies is sound; thus, there is no reason for this Court to grant Holly's Petition in order to re-examine the wisdom of the decisions cited immediately above.

B. Holly's participation in the CRP did not exhaust her administrative remedies.

Holly seeks to excuse her failure to exhaust her administrative remedies by claiming that she exhausted her administrative remedies when she obtained a final

decision from the KDE that she was denied a FAPE by Dawson Springs and Dawson Springs should provide her with compensatory education. The flaw in Holly's argument is that the final decision of the KDE did not complete the administrative process. Rather, the final decision of the KDE rendered September 28, 1999, required Dawson Springs to convene an ARC meeting to "determine how, when, where and in what form the services will be provided." The KDE's decision not to attempt a determination as to "how, when, where and in what form" compensatory education services would be provided to Holly is entirely consistent with one of the primary policies underlying the IDEA – that decisions about the services to be provided to a special education student are best left to the student's ARC, which includes the student, the student's parents, a regular teacher, a special education teacher, and an expert in special education. The members of the ARC are better suited to determine what services should be provided to a particular student because they are familiar with the particular student's status, capabilities and requirements and have individualized testing procedures available to evaluate the student in order to tailor educational services to the student's individual needs.

When the KDE rendered its final decision in the CRP proceeding, Holly had only completed part of the journey which would end in a determination of the compensatory education services she would receive. Holly subsequently abandoned that journey on two occasions: (1) Holly abandoned the November 17, 2000, ARC meeting before it was completed; and (2) Holly abandoned the mediation procedures commenced in May of 2001.[5]

Holly complains that, having won a victory before the KDE as a result of the CRP, she should not be required, as provided in the applicable administrative regulations, to pursue a due process hearing and an appeal to the Exceptional Children Appeals Board before coming to federal

[5] Holly had previously abandoned the due process hearing she requested that was scheduled for November 1994.

court because such a procedure unduly delays her receipt of compensatory education. The answer to this complaint is fourfold: (1) this matter could have been resolved in 1994 if Holly had pursued the due process hearing that was scheduled for November of that year and, if necessary, the subsequent appellate and civil action remedies that were available at the time; (2) much of the delay of which Holly complains since she began the CRP procedure is the result of the actions of her own representatives; (3) in 1998 Holly could have foregone the CRP, requesting an immediate due process hearing, thus avoiding that portion of the delay she complains of consisting of the time during which the case was pending before the KDE; and (4) the facts set forth above demonstrate that Dawson Springs acted timely in scheduling an ARC meeting following the KDE's 1999 decision in the CRP proceedings and in continuing to reconvene ARC meetings in a timely manner in an attempt to resolve the issue, despite Carole's refusal to participate and obstruction of the process.

In any event, Holly cites no rule of law that excuses her from exhausting available administrative remedies merely because they are time-consuming.

The exhaustion mandate of 20 U.S.C. § 1415(l) is clear and unequivocal. Numerous United States courts of appeal have applied the exhaustion requirement based on the salutary policy considerations underlying it. Holly clearly abandoned the administrative remedies provided to her on multiple occasions. The District Court was correct in dismissing Holly's claim due to her failure to exhaust available administrative remedies, belying any reason for granting Certiorari.

C. Holly's argument that pursuing the available administrative remedies would have been futile was waived because it was not made in the District Court; the argument is unsupported by the facts in any event.

Holly's final attempt to avoid the consequences of her failure to exhaust her administrative remedies consists of

her argument that it would have been futile to do so. This argument was rightly rejected by the Sixth Circuit, however, because it was not made in the District Court. *Wright v. Holbrook*, 794 F.2d 1152 (6th Cir. 1986). This Court has likewise held that, generally, a new argument cannot be advanced on review that was not preserved in the proceedings below. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

Even if the futility argument was not waived by failing to make it in the District Court, the facts summarized above dispel any allegation of futility because to the extent she pursued her administrative remedies Holly was successful, as demonstrated by the following facts.

In September 1994, Carole alleged that Dawson Springs had not provided Holly with a FAPE. At Carole's request, the KDE scheduled a due process hearing to be held in November 1994. Carole withdrew her request for a hearing eight days before the hearing was held and the KDE closed its file. Nothing surrounding these events suggests that it would have been futile for Holly to pursue the due process hearing. After all, it was Carole who cancelled the hearing.

After Holly completed her education in Oldham County, Carole commenced a CRP proceeding against Dawson Springs before the KDE in 1998, again contending that Dawson Springs failed to provide Holly a FAPE while she was enrolled at Dawson Springs. The KDE decided the issue against Dawson Springs, finding in its final decision dated September 28, 1999, that Holly had not been provided a FAPE and that Holly was entitled to compensatory education. Since the proceedings before the KDE were resolved in Holly's favor, it certainly cannot be said that the proceeding was futile.

While the KDE found Holly was entitled to compensatory education, it appropriately refrained from determining precisely what Holly's compensatory education should be. Instead, the KDE directed that an ARC be convened to prescribe the appropriate compensatory education.

The ARC meeting required by the KDE in its September 28, 1999, decision was finally held on November 17, 2000. When Dawson Springs did not accede to Carole's demands, Holly and her representatives withdrew from the meeting with full knowledge that the meeting had not been concluded. Despite the obstructionism by Holly's representatives for over a year between September 28, 1999, and November 17, 2000, the ARC adopted a proposal consistent with Career Vision's recommendation: that Holly be provided with one and one-half hours of compensatory education two days per week by Career Visions for two years at Dawson Springs' expense. Any allegation of futility in connection with the November 17, 2000, ARC meeting is dispelled by the fact that, despite Carole's obstructionism and her attorney's arbitrary demands and threats, and despite the withdrawal of Holly and her representatives from the meeting, the ARC adopted a plan consistent with the recommendations of Career Visions, the vendor Carole chose to provide compensatory education to Holly.

After the ARC complied with the KDE's September 28, 1999, decision, two remedies were available to address Carole's dissatisfaction with the compensatory education awarded by the ARC. 707 KAR 1:340 Sections 5 and 6 provided (1) a due process hearing and (2) mediation, if voluntarily selected by Holly. Based on the facts that had occurred through November 17, 2000, there was no reason to believe that these procedures would be futile, since the proceedings to date had resulted in administrative decisions that awarded Holly the compensatory education that was recommended by her chosen vendor, Career Visions.

After a pre-mediation conference held May 22, 2001, at which Dawson Springs made a proposal to provide three years of compensatory education, Holly withdrew from the mediation process and filed her complaint in the District Court. The fact that at the mediation Dawson Springs offered to provide even more compensatory education than had been awarded by the ARC on November 17, 2000, belies any allegation of futility in the mediation process.

In summary, there is no factual basis for Holly's allegation that the administrative remedies available, which she successfully invoked but then abandoned, would have been futile. To the contrary, those procedures resulted in the KDE's September 28, 1999, decision in Holly's favor. As the result of the administrative proceedings that followed the KDE's September 28, 1999, decision, Dawson Springs voluntarily agreed to pay for a two-month evaluation of Holly and ultimately the ARC awarded Holly the very compensatory education recommended by the vendor Carole had chosen. At the pre-mediation conference held in May 2001 Dawson Springs offered to provide even more compensatory education than was awarded by the ARC on November 17, 2000. Holly's response was to abandon the mediation.

Since it is clear that there is no factual basis for Holly's allegation that exhaustion of her administrative remedies would have been futile, there is no compelling reason for this Court to grant Holly's Petition for Writ of Certiorari. Even if Holly's substantive claims had merit, which they do not, she has no right to assert them because she failed to first comply with the requirement that she exhaust the administrative remedies available to her. Since the case was properly disposed of based on Holly's failure to fulfill the exhaustion requirement, there is no basis for granting her Petition for Writ of Certiorari.

II. Holly Is Not Entitled to Money Damages Under § 1983.

Holly, who has no claim for educational expenses, contends she is entitled to general money damages because she asserted a claim under § 1983 in addition to her claim under the IDEA. This contention is erroneous for two reasons: (1) Holly's failure to exhaust her administrative remedies bars *any* claim based on an alleged failure to provide a FAPE, including a claim under § 1983, and (2) because § 1983 creates no remedies, but merely provides a vehicle for enforcing remedies created by other Federal law, and because general money damages, as opposed to

restitution for educational expenses, are not recoverable under the IDEA, money damages are not available in a § 1983 action seeking to enforce the IDEA.

A. Holly's failure to exhaust her administrative remedies bars her § 1983 claim under the IDEA.

20 U.S.C. § 1415(l) makes it abundantly clear that the exhaustion requirement applies whenever the relief sought is relief that is available in an action directly under the IDEA, regardless of which federal statute or other federal law provides the vehicle for bringing the claim to court. This principle applies to Holly's § 1983 claim since her claim is based on the allegation that Dawson Springs denied her a FAPE.

B. General money damages, as distinguished from reimbursement for educational expenses, are not available in a claim brought under § 1983 for an alleged failure to provide a FAPE.

In the circumstances of the instant case the District Court and the Sixth Circuit found it unnecessary to decide whether a claim for an alleged violation of the IDEA may be brought under § 1983, an issue on which there is apparently some dispute. *See W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995) and *Padilla ex rel. Padilla v. School Dist. No. 1 in City and County of Denver, Colo.*, 233 F.3d 1268 (10th Cir. 2000). The reason it is unnecessary for this Court to address this issue through the vehicle of a Writ of Certiorari is that even assuming, for the sake of argument, that § 1983 can be used to enforce the IDEA, money damages are not available in such an action. Holly has already received the compensatory education to which the District Court determined she is entitled – she has incurred no unreimbursed educational expenses and is no longer seeking a FAPE, but seeks only general monetary damages.

It is black-letter law that § 1983 does not create any substantive rights, but merely provides an enforcement mechanism for federally protected rights created by the United States Constitution and the laws enacted pursuant thereto. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Gardenshire v. Schubert*, 205 F.3d 303 (6th Cir. 2000); *Crocker v. Tennessee Secondary School Athletic Association*, 980 F.2d 382 (6th Cir. 1992). Thus, Holly cannot, by seeking to enforce the IDEA through the mechanism of § 1983 in addition to her direct enforcement action, create remedies in addition to those available in an action directly under the IDEA.

The decisions of the various federal courts of appeal establish that there is no right to general money damages, as opposed to restitution for incurred educational expenses, in an action brought directly under the IDEA. Early on the Sixth Circuit held general money damages are not available in a direct action under the IDEA. *Crocker* specifically held that general monetary damages are not available under the IDEA; the only relief available under that statute is restitutionary relief. The court stated in *Crocker*:

> Other cases under the Act have limited monetary damages to restitutionary types of relief. They have allowed restitution to parents for the expense of providing educational services for the handicapped child, but we do not find case authority interpreting the Act to allow an award of general damages for emotional injury or injury to a dignitary interest.

980 F.2d at 386.

Six of the twelve federal courts of appeal have followed suit in eight published decisions. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006); *J.S. v. Isle of Wight County School Board*, 402 F.3d 468 (4th Cir. 2005); *Polera v. Board of Education*, 288 F.3d 478 (2nd Cir. 2002); *Nives-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999); *Sellers v. School Board of Manassas, Va.*, 141 F.3d 524 (4th Cir. 1998), *cert. den.*, 525 U.S. 871 (1998);

Charlie F. v. Board of Education of Skokie School Dist., 98 F.3d 989 (7th Cir. 1996) and *Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996).

The reasoning of these courts is unimpeachable: since there is no right to general money damages (as opposed to reimbursement for educational expenses) in an action brought directly under the IDEA, and since § 1983 is merely an enforcement vehicle that creates no rights, there is no claim for general money damages under § 1983 for an alleged failure to provide a FAPE.

The cases cited at pages 7-8 of Holly's Petition for the proposition that " . . . monetary damages are available under Section 1983 in IDEA matters . . . " do not support that proposition. Several of the cases Holly relies upon involved restitution for educational expenses, not a claim for general monetary damages, and are distinguishable from the instant case in which Holly does not claim to have incurred any unreimbursed educational expenses, but seeks only general monetary damages. These cases include *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995); *Salley v. St. Tammany Parish School Bd.*, 57 F.3d 458 (5th Cir. 1995); *Quackenbush v. Johnson City School District*, 716 F.2d 141 (2nd Cir. 1983); *Jeremy H. by Hunter v. Mount Lebanon School Dist.*, 95 F.3d 272 (3rd Cir. 1996); and *St. Tammany Parish Sch. Bd. v. State of La.*, 142 F.3d 776 (5th Cir. 1998). This Court has previously approved the award of restitutionary educational expenses in *Town of Burlington v. Dept. of Ed. of Mass.*, 471 U.S. 359 (1985) but has not approved an award of general monetary damages in an IDEA case. *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985) did not even involve the IDEA, but involved an allegation that the District of Columbia failed to promulgate an administrative grievance procedure with respect to public housing. *P.C. v. McLaughlin*, 913 F.2d 1033 (2nd Cir. 1990) was decided on the basis of qualified immunity, not whether the plaintiff was entitled to money damages. *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2nd Cir. 1987) does not address the issue of money damages, nor do *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997); *Mallett v. Wis. Div. of Vocational Ed.*, 130

F.3d 1245 (7th Cir. 1997); or *Digre v. Roseville Schools Ind. Dist.*, 841 F.2d 245 (8th Cir. 1988). In *Robinson v. Pinderhughes*, 810 F.2d 1270 (4th Cir. 1987) the court explicitly stated "We express no opinion either on the question of damages or injunctive relief." *Id.* at Footnote 3. *Fontenot v. Louisiana Bd. of Elem. & Secondary Ed.* 805 F.2d 1222 (5th Cir. 1986) involved the issue of attorney's fees, not compensatory damages, as did *Angela L. v. Pasadena*, 918 F.2d 1188 (5th Cir. 1990).

Thus, while several courts, including this Court, have held that in an IDEA case a school district may be ordered to reimburse the student or parents for educational expenses incurred for services that should have been provided by the public school, no court has allowed the recovery of general monetary damages as Holly seeks in the instant case. In fact, the only courts to examine the issue have squarely held that general monetary damages are not recoverable in an IDEA case. There is no conflict among the courts of appeal as to the availability of general monetary damages in an IDEA case. The clarity of the law with regard to the issue whether money damages are available for failure to provide a FAPE and the sound reasoning of the courts that have denied such a remedy demonstrate that there is no compelling reason for this Court to grant Holly's Petition for Writ of Certiorari in order to re-examine the issue.

III. Holly's Claims Are Barred by the Statute of Limitations.

The fact that Holly's claims are barred by the statute of limitations militates against granting her Petition for Writ of Certiorari. Even if there were some compelling reason to examine the issues raised in Holly's Petition, she is not entitled to the relief she seeks because her claims are barred by the statute of limitations.

Dawson Springs raised the applicable statute of limitations as a defense to Holly's claims in the District Court. In the Sixth Circuit Dawson Springs asserted the statute of limitations as alternative grounds for affirming

the District Court's dismissal of Holly's claims under the rule that the District Court's decision should be affirmed if correct for any reason, including a reason not relied upon by the District Court. *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997). In view of the resolution of other issues by the District Court and the Sixth Circuit, it was not necessary for those courts to reach the statute of limitations issue. It is clear, however, that Holly's claims are barred by the applicable statute of limitations.

Holly's mother requested an administrative due process hearing pursuant to 20 U.S.C. § 1415(f) on September 29, 1994, asserting that Dawson Springs had failed to provide Holly with a FAPE. The complaint in the instant case was not filed until almost seven years later on June 28, 2001.

A. Holly's claims accrued no later than September 29, 1994.

The first step in applying a statute of limitations is to determine when the claim accrued, i.e., when the time for filing the action began to run.

The time when a federal cause of action accrues is determined by federal, not state, law. *M.D. v. Southington Board of Education*, 334 F.3d 217 (2nd Cir. 2003); *Leon v. Murphy*, 988 F.2d 303 (2nd Cir. 1993). Federal law generally holds that a federal cause of action accrues when the plaintiff knows, or has reason to know, that a federal cause of action exists. *Id.*

Applying these principles, the Sixth Circuit long ago held, under the IDEA'S predecessor,[6] that a cause of action for failure to provide a FAPE accrues no later than when an effort is first made to enforce the right to a FAPE. *Janzen v. Knox County Board of Education*, 790 F.2d 484 (6th Cir. 1986). Following this rule, the Sixth Circuit held in *James v. Upper Arlington City School District*, 228 F.3d

[6] The Education of All Handicapped Children Act, 20 U.S.C. §§ 1401, *et seq.*

764 (6th Cir. 2000) that the statute of limitations began to run when the child was removed from the school district. Other circuits have reached the same result: *R.R. v. Fairfax County School Board*, 338 F.3d 325 (4th Cir. 2003), and *M.D. v. Southington Board of Education*, *supra*. The rule that the statute of limitations begins to run when an effort is first made to enforce the right to FAPE is consistent with the policies and objectives of the IDEA. If a child has been denied a FAPE, corrective action should be taken at the earliest possible time and should be offered by the LEA where the denial occurred so as to allow the LEA to correct its own mistakes.

Holly's claim under the IDEA is based on Dawson Springs' alleged failure to provide her with a FAPE. Under well-established case law, these claims accrued on September 29, 1994, when Carole requested an administrative due process hearing.

B. Holly's IDEA claim is barred by the statute of limitations.

The IDEA does not contain a statute of limitations; therefore, the Kentucky statute of limitations applicable to the most analogous Kentucky cause of action applies. Two Kentucky statutes of limitation might possibly apply to this case: the one-year statute of limitations for personal injury contained in KRS 413.140 or the five-year statute of limitations for actions upon a liability created by statute when no other time is fixed by the statute creating the liability, KRS 413.120. There appears to be no published opinion determining which statute of limitations applies in Kentucky in an action under the IDEA. In *King v. Floyd County Bd. of Ed.*, 228 F.3d 622 (6th Cir. 2000), the Sixth Circuit held, however, that a 30-day statute of limitations applies to appeals from the decisions of administrative agencies. Thus, insofar as Holly's complaint might be considered an appeal from the September 28, 1999, final determination of the KDE, the appeal was obviously untimely.

Holly's present action under the IDEA is untimely under either of the Kentucky statutes of limitation cited above. The cause of action accrued in September 1994 when Holly's mother complained that Dawson Springs was not providing a FAPE to Holly and requested a due process hearing to remedy the alleged failure. Holly's complaint was not filed until June 28, 2001, over six and one-half years after the cause of action accrued.

In the District Court, Holly attempted to avoid application of the statute of limitations by asserting that the statute was tolled by her disability. As two federal courts of appeal have held, however, the application of tolling provisions is inconsistent with the purposes of the IDEA. When confronted with arguments that state law tolling provisions tolled the statute of limitations under the IDEA, two federal courts of appeal held the application of tolling provisions is inconsistent with federal law and refused to apply them: *M.D. v. Southington Board of Education*, 334 F.3d 217 (2nd Cir. 2003) and *Strawn v. Missouri State Board of Education*, 210 F.3d 954 (8th Cir. 2000). In *M.D. v. Southington Board of Education* the Second Circuit states:

> The Supreme Court has clarified that federal courts must borrow a state's equitable tolling rules *unless* to do so "would defeat the goals of the federal statute at issue." *Hardin v. Straub, 490 U.S. 536, 539, 104 L. Ed. 2d 582, 109 S. Ct. 1998 (1989)*; *see also Pearl, 296 F.3d at 80*. One of the fundamental goals of the statutory scheme codified in the IDEA is to promote the expeditious resolution of educational programming disputes. *See Adler v. Educ. Dep't of State of New York, 760 F.2d 454, 459-60 (2d Cir. 1985)*. Application of the equitable tolling provision of *§ 10-76h(a)(3)* to causes of action that accrued prior to the enactment of that statute would defeat this purpose of the IDEA by permitting claims to be brought long after their accrual date. Accordingly, we hold that the application of the

> equitable tolling rule to such cases, including this one, would "defeat the goals" of the IDEA.

334 F.3d at 224 (italics in original).

In *Strawn*, the Eighth Circuit rejected the application of a five-year statute of limitations for the following reasons:

> The statutory framework of the IDEA and the statute's purpose show that a five-year statute of limitations would frustrate the federal policy of quick resolution of IDEA claims. The IDEA provides for substantial parental involvement in the IEP process, annual reviews, and annual notice to parents of procedural rights. See *20 U.S.C. §1414*(d)(B)(i) (parents must be part of IEP team); *20 U.S.C. §1414*(d)(4)(A)(i) (annual review); *20 U.S.C. §1415*(b)-(d) (notice of procedural rights). This statutory scheme mandating parental participation in an annual decision-making process demonstrates that Congress intended for parents to be actively implicated in the expeditious resolution of IDEA concerns. In addition, children protected by the IDEA benefit greatly from quick resolution of disputes because lost education is a substantial harm, and that harm is exactly what the IDEA was meant to prevent. See *Murphy, 22 F.3d at 1193-94* (central federal policy of IDEA is not to lose "day after irreplaceable day of educational opportunity").

210 F.3d at 957-58 (italics in original).

For these same reasons, the *Strawn* court refused to toll the statute of limitations, stating:

> [w]e decline to apply a tolling provision for minors because tolling the statute of limitations for an entire childhood would frustrate federal policy even more than a five-year statute of limitations.

210 F.3d at 958.

To summarize: The applicable statute of limitations is no more than five years. The limitation period began to run no later than September 1994, when Holly's mother

requested a due process hearing to enforce Holly's right to a FAPE. Instead of pursuing that process, Carole removed Holly to another school district from which Holly received a certificate of completion four years later. Dawson Springs was deprived of the opportunity to provide a free appropriate public education to a student in her early teens and was deprived of the opportunity to correct any mistakes early on. The pursuit of this case is contrary to the IDEA's policy that complaints concerning the services provided to a public school student be addressed and rectified on the spot, and is contrary to the policy underlying statutes of limitation which limit the time within which actions may be brought so as to avoid stale claims. Holly's claim is stale by any stretch of the imagination.

C. The statute of limitations has expired with respect to Holly's claim under § 1983, if she has one.

Kentucky's one-year statute of limitations, KRS 413.140, is applicable to claims under § 1983. *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179 (6th Cir. 1990). Accordingly, Holly's claim under § 1983, if she has one, is barred.

CONCLUSION

Holly has demonstrated no compelling reason, as described in SUP. CT. R. 10, why this Court should grant her Petition for Writ of Certiorari. The District Court and the Sixth Circuit relied on well-established law that is firmly grounded in the policies and purposes underlying the IDEA and § 1983 in holding that Dawson Springs was entitled to dismissal of Holly's claims.

The policy of the IDEA, as developed in the cases decided thereunder, is to require that the parties exhaust their administrative remedies, rather than bringing their dispute to a court before educational professionals have had an opportunity to make a reasoned determination as to what remedy is appropriate under the circumstances

and to make a detailed administrative record for a court to review. The salutary purposes of this policy are set forth above and need not be repeated.

Holly has no claim for general money damages, as opposed to restitution for educational expenses, either directly under the IDEA or under § 1983. Case law developed under the IDEA does not allow an award of such general money damages. It is elemental that § 1983 is merely a mechanism for enforcing substantive federal rights created elsewhere; § 1983, itself, creates no substantive rights. A complaining party cannot, by suing under § 1983 rather than under the IDEA directly, create a right to money damages that otherwise does not exist.

In either event, Holly's claims are barred by the statute of limitations which began to run in 1994 when Carole requested a due process hearing to address the issue whether Holly was being provided with a FAPE by Dawson Springs. Holly's lawsuit, filed six and one-half years later, is untimely. Since Holly is not entitled to the relief she seeks regardless of the merits of her claims under the IDEA and § 1983, her Petition should be denied.

Accordingly, Dawson Springs Independent School District and David Boggs request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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